Supreme Court, U. S.
FILED
JAN 30 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

NO. 77-915

ERNEST H. ROBINSON,

Appellant,

VS.

STATE OF GEORGIA,

Appellee.

APPELLEE'S MOTION TO DISMISS AND MOTION TO AFFIRM IN THE ALTERNATIVE WITH SUPPORTING BRIEF

ON APPEAL FROM THE COURT OF APPEALS OF GEORGIA

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Appellee, State of Georgia, moves to dismiss pursuant to Rule 16(1)(b) on the grounds that:

(1) The appeal does not present a substantial federal question;

(2) The judgment rests on an adequate non-federal basis;

(3) The Court of Appeals of Georgia had and followed the precedents set by this Court which adequately covered all questions raised on appeal;

(4) The Appellant did not in the trial court demand or request that he be tried by a jury of more than five persons; and

(5) The Appellant did not raise in the Court of Appeals of Georgia the question of Obscenity vel non of the magazines *Cock Hungry* and *Raw Passion.*

In the alternative, appellee moves to affirm the judgment of the Court of Appeals of Georgia, pursuant to Rule 16(1)(c) on the grounds that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

In the alternative, appellee further moves to dismiss or affirm pursuant to Rule 16(1)(d) on the grounds that the sale of the magazines *Cock Hungry* and *Raw Passion* by the appellant was and is sufficient to support his single-count conviction, and the question of whether these magazines were constitutionally protected was not raised nor passed upon by the appellate courts of Georgia, and this question was therefore waived by the appellant.

ARGUMENT

I.

A. APPELLANT DID NOT DEMAND A TRIAL BY JURY COMPOSED OF MORE THAN FIVE PERSONS.

Appellant asserts on page 5 of his Jurisdictional Statement that he ". . . filed a motion requesting trial before a twelve-person jury, arguing that five-person juries were violative of his rights under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution. . . ." This assertion is not supported by the record in this case.

Appellant filed a motion (consolidated with other

unrelated cases and defendants) denominated by him a "Second Motion To Dismiss Or In The Alternative Demur" (R-10), in which he demanded that the accusation against him be dismissed because a five-person jury violated the Sixth and Fourteenth Amendments. He further asserted in said motion that ". . . the lowest number of jurors allowed in a criminal trial is six. . . ."

At no time did the appellant demand to be tried by a jury composed of more than five persons, he merely sought to have the charges against him dismissed rather than demanding that a jury composed of six or twelve persons be empaneled to try the case.

A copy of the appellant's motion appearing on page 10 of the record is set forth as Appendix A hereto.

B. A JURY OF FIVE PERSONS IS CONSTITUTIONALLY ADEQUATE FOR THE TRIAL OF MISDEMEANOR CASES WHERE THE MAXIMUM POSSIBLE IMPRISONMENT IS TWELVE MONTHS.

Appellant was tried in the Criminal Court of Fulton County[1] by a jury of five persons[2] selected from a panel of twelve prospective jurors qualified to serve, with the appellant having four peremptory challenges, the State having three peremptory challenges, and with the appellant having benefit of the first and last challenge.

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[1] The name of the Criminal Court of Fulton County has been changed, effective January 2, 1977, by the merger of the Criminal Court of Fulton County with the Civil Court of Fulton County into a court known as and named the State Court of Fulton County. Georgia Laws 1976 Session, p. 3023.

[2] Effective March 24, 1976, the number of jurors was changed from five to six in the criminal Court of Fulton County. Georgia Laws 1976 Session, p. 3019.

It was necessary that each individual juror believe, beyond a reasonable doubt, that Appellant was guilty of the offenses with which he was charged and that all the elements of the crimes were present, including the fact of obscenity. Jury verdicts in Georgia must be unanimous, *Ball v. The State of Georgia*, 9 Ga. App. 162, 20 S.E. 888 (1911), and the jury in this case was so charged (T-138).

The five-man jury comports with this Court's decision in *Williams v. Florida*, 399 U.S. 78 (1970). In that case, this Court held a six-man jury was constitutionally adequate in State trials under the Sixth and Fourteenth Amendments. This Court said:

> "The purpose of the jury trial, as we noted in *Duncan*, is to prevent oppression by the Government. 'Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric Judge.' *Duncan v. Louisiana*, supra, 391 U.S., at 156; 88 S. Ct., at 1451. Given this purpose, the essential feature of a jury obviously lies in the interposition between the accused and his accuser of the common-sense judgment of a group of laymen, and in the community participation and shared responsibility that results from that group's determination of guilt or innocence. The performance of this role is not a function of the particular number of the body that makes up the jury. To be sure, the number should probably be large enough to promote group deliberation, free from outside attempts at intimidation, and to provide a fair possibility for obtaining a representative cross section of the community. But we find little reason to think that these goals are in any meaningful sense less likely to be achieved when the

> jury numbers six, than when it numbers 12—*particularly if the requirement of unanimity is retained. And, certainly the reliability of the jury as a fact-finder hardly seems likely to be a function of its size.*
>
> It might be suggested that the 12-man jury gives a defendant a greater advantage since he has more 'chances' of finding a juror who will insist on acquittal and thus prevent conviction. But the advantage might just as easily belong to the State, which also needs only one juror out of twelve insisting on guilt to prevent acquittal." (Emphasis supplied) *Williams v. Florida*, 399 U.S. 78, 103, 104 (1970).

It is clear from *Williams* that mere size is not the controlling factor in the Sixth Amendment right to a jury trial. One inportant factor is the insulation provided by a law body standing between the government and the defendant. See *Baldwin v. New York*, 399 U.S. 66 (1970); *Torres v. Delgado*, 391 F. Supp. 379 (D.C.P.R. 1974), affirmed 510 F.2d 1182 (1st Cir. 1975).

The Appellant has not complained that an arbitrary exclusion of a particular class has taken place. *Williams v. Florida*, 399 U.S. 78 (1970).

Appellant argues that a lesser number than 12 or six denies a cross section—however, this Court said in *Williams:*

> ". . . the concern that the cross section will be diminished if the jury is decreased in size from 12 to six seems an unrealistic one." *Williams v. Florida*, 399 U.S. 104 (1970).
>
> As one commentator has said (speaking of civil cases),

"Because the members of the five-man jury represent a cross section unit of the community, they will continue to bring into the courtroom the diversity of viewpoint, the objectivity of detachment, the non-professional sense of values, and the spirit of justice and fairness unhampered by precedent, which are the foundations of the jury system as we respect it. Moreover, all of the historic values placed upon the jury as a 'casual tribunal' attach readily to the five-member jury as it actually functions in the jury box; human virtues—and shortcomings—are fully present whether there are twelve or five jurors." *THE FIVE-MAN CIVIL JURY*, 51 Geo. L.R. 120, 137 (1962).

This court has not decided what the minimum number of jurors may be; however, in *Williams* the Court stated in a footnote that six is above the minimum:

"We have no occasion in this case (*Williams*) to determine what minimum number can still constitute 'a jury,' *but we do not doubt that six is above that minimum*" (Emphasis supplied), *Williams v. Florida*, 399 U.S. 78, 92 N. 28.

If six is above the minimum, it follows that five cannot be below the minimum. There is no number in between.

In *Johnson v. Louisiana*, 406 U.S. 356 (1971) the Court considered the jury system of Louisiana and wrote:

"Louisiana has permitted less serious crimes to be tried by five jurors with unanimous verdicts, more serious crimes have required the assent of nine of 12 jurors, and for the most serious crimes, a unanimous verdict of 12 jurors is stipulated. In appellant's case, nine jurors rather than five or 12

were required for a verdict. We discern nothing invidious in this classification. We have held that the States are free under the Federal Constitution to try defendants with juries of less than 12 men. *Williams v. Florida*, 399 U.S. 78 (1970).

. . . As to the crimes triable by a five-man jury, if appellant's position is that it is easier to convince nine of 12 jurors than to convince all of five, he is simply challenging the judgment of the Louisiana Legislature. That body obviously intended to vary the difficulty of proving guilt with the gravity of the offense and the severity of the punishment. We remain unconvinced by anything appellant has presented that this legislative judgment was defective in any constitutional sense." *Johnson v. Louisiana*, 406 U.S. 356, 364, 365 (1971).

The Court again in *Colgrove v. Battin*, 413 U.S. 149 (1973) was faced with making a decision on the question of the number of jurors required, this time the question arose under the Seventh Amendment and concerned civil juries. The Court in following *Williams v. Florida*, supra, stated:

". . . Keeping in mind the purpose of the jury trial in criminal cases to prevent government oppression, *Williams*, 399 U.S., at 100, 90 S. Ct., at 1905, and, in criminal and civil cases, to assure a fair and equitable resolution of factual issues, *Gasoline Products Co. v. Champlin Co.*, 283 U.S. 494, 498, 51 S. Ct. 513, 514, 75 L. Ed. 1188 (1931), the question comes down to whether jury performance is a function of jury size. In *Williams*, we rejected the notion that 'the reliability of the jury as a factfinder . . . [is] a function of its size,' 399 U.S., at 100-101, 90 S. Ct., at 1906, and nothing has been suggested to lead us to alter that conclusion. Accordingly, we think it cannot be said that 12 members is a substantive aspect of the right of

trial by a jury." 413 U.S. 149, 157; 93 S. Ct. 2448, 2453 (1973).

It is clear that the Constitution does not require any specific number of persons to make up a trial jury; and had the framers of the Constitution, and the Amendments thereto, intended that trial juries be composed of not less than twelve persons, or any other number, the minimum number could easily have been written into the Constitution. This was not done, and therefore, it can be assumed that it was intended that the number required be flexible and left to Congress and the legislatures of the various states to make that determination.

In *Williams v. Florida*, supra, a six-person jury was held to be constitutionally adequate in a case involving the felony offense of robbery where a life sentence was imposed. In this case, the appellant was tried by a five-person jury for a misdemeanor offense where the maximum imprisonment could be no more than twelve months.

While it is clear that a criminal defendant is entitled to a jury trial except for petty offenses, *Baldwin v. New York*, 399 U.S. 66 (1970), there is no constitutional requirement that the question of obscenity be determined by more than one person in a civil proceeding, a judge without the intervention of a jury is competent to perform this function. *Alexander v. Virginia*, 413 U.S. 836, 93 S. Ct. 2803 (1973).

On a criminal trial for distributing obscene materials, it is clear that the number of jurors is constitutionally irrelevant as long as the number is sufficient to carry out the jury's historical function and five jurors are adequate for that purpose.

II.

SECTION 26-2101(c) OF THE CRIMINAL CODE OF GEORGIA DOES NOT TOTALLY PROHIBIT THE DISSEMINATION OF DEVICES DESIGNED OR MARKETED AS USEFUL PRIMARILY FOR THE STIMULATION OF HUMAN GENITALS, NOR IS THE STATUTE UNCONSTITUTIONAL FOR ANY REASON ASSERTED BY THE APPELLANT.

The statute under which appellant was charged, tried, and convicted is Section 26-2101 of the Criminal Code of Georgia, Georgia Laws 1968, pages 1249, 1302, as amended by Georgia Laws 1971, page 344, and further amended by Georgia Laws 1975, page 498.

To fall within paragraph (c) of Section 26-2101 of the Criminal Code of Georgia, any person charged with an offense thereunder must, *knowing the obscene nature of the devices*, sell, lend, rent, lease, give, advertise, publish, exhibit, or otherwise disseminate the device or devices to another person, or possess them with intent to do so. The statute is therefore aimed at a particular segment of society, i.e., those who distribute material of a sexual nature, those who purvey filth for monetary gain. These persons must be assumed to possess specialized knowledge of the use and purpose of the things they sell. The statutory language conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices employed by persons who distribute such merchandise. See *Chaplinsky v. New Hampshire*, 315 U.S. 568; *U.S. v. Petrillo*, 332 U.S. 1, 7-8; and *Boyce Motor Lines, Inc. v. U. S.*, 342 U.S. 337, 340. The section in question is not void for vagueness in that men of common under-

standing must not necessarily guess at its meaning. Persons have fair warning of the prohibited conduct. *Bouie v. City of Columbia*, 378 U.S. 347. Additionally, sections of the code which relate to the same subject matter must be construed together. Section 26-2021 of the Criminal Code of Georgia (Georgia Laws 1975, page 402) makes the instrumental manipulation of another's genital organs for money a crime. When the two sections are read together, 26-2101(c) and 26-2021, the law is made clear that the distribution of instruments commonly and primarily used to masturbate or erotically stimulate the genital organs is prohibited conduct.

Artificial sexual organs or extensions have been held to be devices designed and adapted for indecent or immoral use under 18 U.S.C.A. 1462 and thereby obscene. *U.S. v. Gentile*, 211 F. Supp. 383 (D.C. Maryland 1962). The language in 18 U.S.C.A. 1462 has been held to be constitutional. *U.S. v. Orito*, 413 U.S. 139 (1973); *U.S. v. Reidel*, 402 U.S. 354; *U.S. v. 37 Photographs*, 402 U.S. 376; *Manual Enterprises v. Day*, 370 U.S. 478. A state court has applied the obscenity statute to artificial penises. *People v. Clark*, 304 N.Y.S. 2d 326 (1969).

The statute in question here does not encompass conduct that is constitutionally protected and does not infringe upon the right of privacy, as it does not fall within the prohibition announced in *Stanley v. Georgia*, 394 U.S. 557. See also *Paris Adult Theatre I v. Slaton*, 413 U.S. 49; and *U.S. v. Orito*, 413 U.S. 139.

Appellant contends that the standards or guide lines set forth in *Miller v. California*, 413 U.S. 15; 93 S. Ct. 2607 (1973), used in determining obscenity in press materials, applies to the devices described and prohibited by Criminal Code Section 26-2101(c). We disagree. The Miller guide lines were set up by this court to be used in protecting the rights guaranteed by the First Amendment to the Constitution of the United States, freedom of speech and freedom of the press. The devices prohibited by Code Section 26-2101 are neither speech nor press materials and are therefore not protected by the First Amendment.

The appellant compares the Georgia obscenity statute with that dealt with by the Supreme Court of the United States in the case of *Griswold v. Connecticut*, 381 U.S. 479 (1965); 85 S.Ct. 1678. The court there dealt with statutes prohibiting the use of contraceptives.

The Georgia statute does not prohibit the use of the devices described in Code Section 26-2101(c) by married couples or anyone else. As a matter of fact and law, the statute provides exceptions whereby persons can avail themselves of such devices, Code Section 26-2101(e). The procedure required in the exception is the same as that required for dispensing most drugs, including those used for birth control.

The court in *Griswold*, supra, recognized a distinction between "forbidding the use of contraceptives rather than regulating their manufacture or sale." 381 U.S. 479, 485; 85 S. Ct. 1678, 1682 (9, 10).

The court in *Paris Adult Theatre I v. Slaton*, 413 U.S. 49 (1973), again recognized a distinction between the rights of a theater and the rights of privacy of its customers. The court there recognized legitimate state interests in stemming the tide of commercialized obscenity, the interests of the public in the quality of life and the total community environment, the tone of

commerce in great city centers, and possibly, the public safety itself. The court there mentioned the arguable correlation between obscene material and crime in holding that state interests are involved.

There are numerous statements and restatements in *Paris Adult Theatre I v. Slaton*, supra, reiterating the rights of the several states to legislate in matters dealt with by the Georgia Legislature in Code Section 26-2101. Some of those excerpts are:

> ". . . From the beginning of civilized societies, legislators and judges have acted on various unprovable assumptions. Such assumptions underlie much lawful state regulation of commercial and business affairs. . . . The same is true of the federal securities and antitrust laws and a host of federal regulations. . . . Understandably, those who entertain an absolutist view of the First Amendment find it uncomfortable to explain why rights of association, speech, and press should be severely restrained in the marketplace of goods and money, but not in the marketplace of pornography." 413 U.S. 49, 61; 93 S. Ct. 2628, 2637 (11).

> ". . . The sum of experience, including that of the past two decades, affords an ample basis for legislatures to conclude that a sensitive, key relationship of human existence, central to family life, community welfare, and the development of human personality, can be debased and distorted by crass commercial exploitation of sex. Nothing in the Constitution prohibits a state from reaching such a conclusion and acting on it legislatively simply because there is no conclusive evidence or empirical data. . . . It is argued that individual 'free will' must govern, even in activities beyond the protection of the First Amendment and other constitutional guarantees of privacy, and that government cannot legitimately impede an individual's desire to see or acquire obscene plays, movies, and books. We do indeed base our society on certain assumptions that people have the capacity for free choice—those in politics, religion, and expression of ideas—are explicitly protected. Totally unlimited play for free will, however, is not allowed in our or any other society. . . ." 413 U.S. 49, 63; 93 S. Ct. 2628, 2638.

> ". . . Even assuming that petitioners have vicarious standing to assert potential customers' rights, it is unavailing to compare a theater, open to the public for a fee, with the private home of *Stanley v. Georgia*, 394 U.S., at 568, 89 S. Ct., at 1249, and the marital bedroom of *Griswold v. Connecticut*, supra, 381 U.S., at 485-486; 85 S. Ct., at 1682-1683. . . ." 413 U.S. 49, 65; 93 S.C. 2628, 2639 (13, 14).

> ". . . We have declined to equate the privacy of the home relied on in *Stanley* with a 'zone' of 'privacy' that follows a distributor or a consumer of obscene materials wherever he goes." 413 U.S. 49, 66; 93 S. Ct. 2628, 2640 (17-21).

The State of Georgia has a legitimate interest in the subject matter of Code Section 26-2101(c) and the same is not unconstitutional for any reason asserted by the appellant.

III.

JURY INSTRUCTIONS ON SCIENTER THAT REQUIRED THE STATE TO PROVE BEYOND A REASONABLE DOUBT THAT THE ACCUSED HAD KNOWLEDGE, EITHER ACTUAL OR CONSTRUCTIVE, AND THAT CONSTRUCTIVE KNOWLEDGE IS KNOWLEDGE OF FACTS WHICH WOULD PUT A REASONABLE AND PRUDENT PERSON ON NOTICE AS TO THE SUSPECT NATURE OF THE MATERIAL, ARE SUFFICIENT TO MEET CONSTITUTIONAL MINIMUM STANDARDS.

Section 26-2101 of the Criminal Code of Georgia provides, in part, as follows:

> "(a) a person commits the offense of distributing obscene materials when he sells, lends, rents, leases, gives, advertises, publishes, exhibits or otherwise disseminates to any person any obscene material of any description, knowing the obscene nature thereof, or offers to do so, or possesses such material with the intent to do so, provided that the word 'knowingly,' as used herein, shall be deemed to be either actual or constructive knowledge of the obscene contents of the subject matter, and *a person has constructive knowledge of the obscene contents if he has knowledge of facts which would put a reasonable and prudent person on notice as to the suspect nature of the material. . . .*" (Emphasis added)

The trial court charged the jury on scienter according to the provisions of the Georgia statute, supra, and this charge is in keeping with a line of cases on the question of scienter in obscenity cases dating back to the year 1896 when the court held that

the person charged with the offense of mailing obscene material must know *or have notice of the contents* of the material.

> "The inquiry, in proceedings under Rev. Stat. §3893, is whether the paper charged to have been obscene, lewd, and lascivious was in fact of that character, and if it was of that character and was deposited in the mail *by one who knew or had notice at the time of its contents*, the offense is complete, although the defendant himself did not regard the paper as one that the statute forbade to be carried in the mails." (Emphasis added) *Rosen v. United States*, 161 U.S. 29 (1896).

Rosen did not require the accused to have knowledge of the obscenity of the material, only *notice of its contents*.

> ". . . Eyewitness testimony of a bookseller's perusal of a book hardly need be a necessary element in proving his awareness of its contents. The circumstances may warrant the inference that he was aware of what a book contained, despite his denial.
>
> "We need not and most definitely do not pass today on what sort of mental element is requisite to a constitutionally permissible prosecution of a bookseller for carrying an obscene book in stock; whether honest mistake as to whether its contents in fact constituted obscenity need be an excuse; whether there might be circumstances under which the State constitutionally might require that a bookseller investigate further, or might put on him the burden of explaining why he did not, and what such circumstances might be. . . ." *Smith v. California*, 361 U.S. 147, 154 (1959).

The Georgia statute, 26-2101 supra, is very similar and compares to New York statutes dealt with by the

court in *Mishkin v. New York*, 383 U.S. 502 (1966) and *Ginsberg v. New York*, 390 U.S. 629 (1968).

The *Mishkin* case pointed out that the New York Court of Appeals had construed Section 1141 of the New York Penal Law to require the "vital element of scienter," and it defined the required mental element in these terms:

> "a reading of the statute (§1141) as a whole clearly indicates that only those who are in some manner aware of the character of the material they attempt to distribute should be punished. It is not innocent but calculated purveyance of filth which is exorcised. . . ."

Section 26-2101 of the Georgia Code requires "knowledge of facts which would put a reasonable and prudent person on notice," while Section 1141 of the New York Penal Law requires the accused to be "in some manner aware."

The statute dealt with in *Ginsberg* defined knowingly as "knowledge" of, or "reason to know" of, the character and content of the material.

Neither *Mishkin* nor *Ginsberg* requires actual knowledge as contended by the appellant herein. Both cases were reviewed and followed in *Hamling v. United States*, 418 U.S. 87 (1974), where the court construed 18 U.S.C. §1461, and held:

> "To require proof of a defendant's knowledge of the legal status of the materials would permit the defendant to avoid prosecution by simply claiming that he had not brushed up on the law. Such a formulation of the scienter requirement is required neither by the language of 18 U.S.C. §1461 nor by the Constitution."

In the case of *Kuhns v. California*, ____ U.S. ____, 97 S. Ct. 2938, this court recently denied petition for certiorari to review jury instructions based upon the California obscenity statute which defines "knowingly" as "[be] aware of the character of the matter. . . ." *California v. Kuhns*, 61 Cal. App. 3d 735, 132 Cal. Rptr. 725, 737 (1976).

Appellant concedes that proof of scienter may be made by circumstantial evidence. Appellee contends and respectfully submits that to prove the accused was aware of facts that would put a reasonable and prudent person on notice of the suspect character of the material, is proof of knowledge of the character of the material by circumstancial evidence.

In the case of *Nash v. United States*, 229 U.S. 373 (1913), the court said:

> "In many instances a man's fate depends upon his rightly estimating, that is as the jury subsequently estimates it, some matter of degree, and there is no constitutional difficulty in the way of enforcing the criminal provisions of the Sherman Anti-Trust Act on the ground of uncertainty as to the prohibitions."

Whenever the law draws a line, there will be cases very near each other on opposite sides. The precise course of the line may be uncertain, but no one can come near it without knowing that he does so, if he thinks, and if he does so, it is familiar to the criminal law to make him take the risk. *Nash v. United States*, supra; *United States v. Wurzbach*, 280 U.S. 396, 399 (1930). One who goes perilously close to an area of proscribed conduct shall take the risk that he may cross

the line. *Boyce Motor Lines, Inc. v. United States*, 342 U.S. 337, 340.

In summary, on the question of scienter, the Georgia law requires and the jury was instructed that the State must prove, as a bare minimum, that the appellant had knowledge of facts which would put a reasonable and prudent person on notice as to the suspect nature of the material. No more has ever been required. "Notice of its contents" is required by *Rosen v. United States*, supra; "in some manner aware" was sufficient in *Mishkin v. New York*, supra; "reason to know" was sufficient in *Ginsberg v. New York*, supra; "be aware of the character of the matter" was sufficient in *Kuhns v. California*, supra; eyewitness testimony that the appellant viewed the film is not necessary, *Smith v. California*, supra; and proof of knowledge of the legal status of the material is not required, *Hamling v. United States*, supra.

IV.

THE TRIAL COURT DID NOT ERR IN ADMITTING INTO EVIDENCE THE DEVICES SEIZED BY THE OFFICERS AT THE TIME APPELLANT WAS ARRESTED.

On August 6, 1975, officers proceeded to the Roswell Road Adult Book Store located in the City of Atlanta, Fulton County, Georgia, where they purchased from the appellant two magazines, *Cock Hungry* and *Raw Passion*, and determined that in plain view, on display for sale in the store were numerous sexual devices proscribed by Section 26-2101(c) of the Criminal Code of Georgia. The officers testimony left no doubt that this was a public place, replete with books and magazines,

mini-movies, and peep shows which depicted and described explicit sexual acts.

The sexual devices on public display for sale, in open and plain view of everyone who entered the store, were seized by the officers. Nothing else was seized.

The appellant contends that the devices seized are protected by the First Amendment to the Constitution and cites *Roaden v. Kentucky*, 413 U.S. 496 (1973) and *Lee Art Theatre v. Virginia*, 392 U.S. 636 (1969) as cases controlling in the seizure of such devices. Needless to say, we disagree. Both the cases cited are cases dealing with the seizure of motion picture films from commercial theaters. We would agree that motion picture films, books, and magazines would not be subject to seizure under the same set of facts and circumstances as those in this case in which the devices were seized.

There is a vast difference in devices designed and/or marketed as useful primarily for the stimulation of human genital organs on the one hand, and motion picture films, books, and magazines on the other; and on the one hand, to seize films, books, and magazines without a prior judicial determination would be a prior restraint of material protected by the First Amendment of the United States Constitution under the present decisions of our appellate courts, while on the other hand, the dissemination of material described in Code Section 26-2101(c), prohibited by Code Section 26-2101(a), would not be, and was not in this case, a prior restraint of material protected by the First Amendment.

The Supreme Court of the United States in *Roaden v. Kentucky*, supra, recognized and made a distinction in making a determination as to reasonableness of the seizure, 413 U.S. 496, 501; 93 S. Ct. 2796, 2800 (1, 2).

The devices seized, not afforded protection under the First Amendment of the Constitution, are declared to be contraband under the provisions of Code Section 26-2104, 'and therefore subject to seizure under the same rules as other contraband such as illegal drugs, stolen merchandise, and other fruits of crime.

What a person knowingly exposes to the public, even in his own house or office, is not subject to Fourth Amendment protection. *Katz v. U.S.*, 389 U.S. 347, 351; 88 S. Ct. 507, 511 (1967).

Contraband items in plain view of police officers, in a place where the officers have a right and are authorized to be, are subject to and may be seized without a search warrant. *Coolidge v. New Hampshire*, 403 U.S. 443; 91 S. Ct. 2022 (1971); *Harris v. United States*, 390 U.S. 234, 236; 88 S. Ct. 992, 993 (1968).

The devices seized were in plain view of the officers while the officers were in a lawful position to view the items seized, and for that and the foregoing reasons asserted, no warrant was necessary to make a lawful seizure.

V.

THE QUESTION OF OBSCENITY VEL NON WAS NOT RAISED BY APPELLANT IN THE COURT OF APPEALS OF GEORGIA NOR WAS IT PASSED UPON.

The appellant failed to challenge in the Court of Appeals of Georgia the sufficiency of the evidence to sustain the finding by the trial jury that the materials were obscene. See the opinion in this case by the Court of Appeals of Georgia, page A.1 of appendix to appellant's Jurisdictional Statement, where the Court wrote:

> "Appellant appeals his conviction for a violation of the illegal sale of pornographic paraphernalia, a misdemeanor, and his sentence to confinement for 12 months. *He does not raise any issue as to the sufficiency of the evidence, but restricts his enumerations of error to the denial of numerous pretrial motions, and a related charge of the Court.*" (Emphasis added)

The Supreme Court of Georgia in *Dyke v. The State*, 232 Ga. 817, 821, and the Court of Appeals in *Ballew v. The State*, 138 Ga. App. 530, recognize that they are not bound to approve the jury's finding and that an independent review must be made to determine the constitutional fact of obscenity when the question is invoked on appeal. In this case, the appellant chose not to invoke appellate review in the Court of Appeals of Georgia on the question of obscenity vel non, and by making that choice he has waived appellate review of the question. Ordinarily, this Court does not decide questions not raised or resolved in the lower court. *It is only in exceptional cases carried to it from the federal courts that questions not pressed or passed upon below are reviewed. Youakim v. Miller*, ____ U.S. ____, 96 S. Ct. 1399 (1976). (Emphasis added)

CONCLUSION

For all the foregoing reasons, the appeal should be dismissed; or in the alternative, the judgment of the Court of Appeals of Georgia should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I have this day caused to be mailed three copies of the within motion, first class postage prepaid, to Robert Eugene Smith, Esq., 1409 Peachtree Street, N.E., Atlanta, Georgia 30309.

This day of January, 1978.

LEONARD W. RHODES
Counsel for Appellee

APPENDIX A

IN THE CRIMINAL COURT OF FULTON COUNTY STATE OF GEORGIA

THE STATE OF GEORGIA, *Plaintiff*,	
–vs–	
EARNEST ROBINSON;	CASE NO. 156435
EARNEST ROBINSON;	CASE NO. 147263
JOHN PEAVY;	CASE NO. 156440
DAVID BURNETTE;	CASE NO. 156432
ELIZABETH GREEN; and	CASE NO. 156433
JAMES SHAW,	CASE NO. 156431
Defendants.	

SECOND MOTION TO DISMISS OR IN THE ALTERNATIVE DEMUR

Defendants move the Court to dismiss the above cases on the grounds that a five-person jury is used to determine innocence or guilt, and under the Sixth and Fourteenth Amendments of the United States Constitution this is constitutionally invalid since the lowest number of jurors allowed in a criminal trial is six. Further, Art. VI, Sec. XVI, para. I, of the State Constitution (Code 2-5105) and Georgia L. 1890-1891, Vol. 2, p. 935, Georgia L. 1935, 498, are unconstitutional on their face and as applied, as said laws permit a five-person jury and therefore deny the Defendants a six-person jury trial under the Sixth and Fourteenth Amendments.

WHEREFORE, Defendants pray that their Second Motion to Dismiss be sustained.

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William v. Florida, 399 U.S. 78, 136
Baldwin v. New York, 399 U.S. 60